3-1700-9105-2

STATE OF MINNESOTA
OFFICE OF ADMINISTRATIVE HEARINGS

FOR THE MINNESOTA DEPARTMENT OF HUMAN RIGHTS

Michael Curtis,

Complainant,

v.

Medtronic, Inc.,

Respondent.

ORDER GRANTING RESPONDENT'S MOTION FOR SUMMARY DISPOSITION

This matter is before Administrative Law Judge Allen E. Giles on a Motion for Summary Judgment filed by the Respondent, Medtronic, Inc. Sally A. Scoggin, 2200 First National Bank Building, St. Paul, Minnesota 55101, represents Medtronic, Inc. ("Medtronic" or Respondent). Randall J. Fuller, Babcock, Locher, Neilson & Mannella, 118 East Main Street, Anoka, Minnesota 55303, filed the reply on behalf of the Complainant, Michael Curtis. The record closed on this motion on April 25, 1995, with the receipt of the final reply brief.

Based upon all the files, records, and proceedings herein, and for the reasons set forth in the accompanying Memorandum, the Administrative Law Judge makes the following:

ORDER

The Respondent's Motion for Summary Judgment is hereby GRANTED.

Dated: May ___, 1995.

_____
ALLEN E. GILES
Administrative Law Judge

NOTICE

Pursuant to Minn. Stat. § 363.071, subd. 2, this Order is the final decision in this case and under Minn. Stat. § 363.072, the Commissioner of the Department of Human Rights or any other person aggrieved by this decision may seek judicial review pursuant to Minn. Stat. §§ 14.63 through 14.69.

MEMORANDUM

Michael Curtis asserts that he was discharged by Medtronic, Inc. on the basis of age in violation of Minn. Stat. Chap. 363 ("Human Rights Act"). Medtronic filed an Answer to the Complaint denying that age was the basis for Complainant's discharge. Complainant maintains that the reasons offered by Medtronic to explain the discharge are pretextual. Respondent filed a motion requesting summary judgment.

Summary disposition is the administrative equivalent of summary judgment. Minn. Rule 1400.5500(K). Summary judgment is appropriate where there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Sauter v. Sauter, 70 N.W.2d 351, 353 (Minn. 1955); Louwagie v. Witco Chemical Corp., 378 N.W.2d 63, 66 (Minn. App. 1985); Minn.R.Civ.P. 56.03 (1984). A genuine issue is one that is not sham or frivolous. A material fact is a fact whose resolution will affect the result or outcome of the case. Illinois Farmers Insurance Co. v. Tapemark Co., 273 N.W.2d 630, 634 (Minn. 1978); Highland Chateau v. Minnesota Department of Public Welfare, 356 N.W. 2d 804, 808 (Minn. App. 1984).

Medtronic, as the moving party in this case, has the initial burden of showing the absence of a genuine issue concerning any material fact. To successfully resist a motion for summary disposition, the nonmoving party, Mr. Curtis, must show that specific facts are in dispute which have a bearing on the outcome of the case. Hunt v. IBM Mid America Employees, 384 N.W.2d 853, 855 (Minn. 1986). The existence of a genuine issue of material fact must be established by the nonmoving party by substantial evidence; general averments are not enough to meet the nonmoving party's burden under Minn.R.Civ.P. 56.05. Id.; Murphy v. Country House, Inc., 307 Minn. 344, 351-52, 240 N.W.2d 507, 512 (1976); Carlisle v. City of Minneapolis, 437 N.W.2d 712, 715 (Minn. App. 1988). The evidence presented to defeat a summary judgment motion, however, need not be in a form that would be admissible at trial. Carlisle, 437 N.W.2d at 715 (citing Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986)). The nonmoving party also has the benefit of the most favorable view of the evidence. All doubts and inferences must be resolved against the moving party. See Celotex, 477 U.S. at 325; Thiele v. Stich, 425 N.W.2d 580, 583 (Minn. 1988); Greaton v. Enich, 185 N.W.2d 876, 878 (Minn. 1971); Dollander v. Rochester State Hospital, 362 N.W.2d 386, 389 (Minn. App. 1985).

Based upon the pleadings and affidavits submitted in this matter, and construing the facts in the light most favorable to the Complainant, the underlying facts in this matter appear to be as follows.

Michael Curtis was employed by Medtronic as a security guard in 1970. He continued in Medtronic's employ until September 28, 1993, when he was discharged. Throughout his term of employment with Medtronic, Curtis' performance reviews noted his poor performance in relating with other employees. In all other areas, Curtis' performance was satisfactory. In the 1970s, Curtis was promoted to supervisor. In 1979, Curtis was transferred to the third shift due to attitude and performance problems. He has remained on the third shift ever since. His performance review in 1985 notes that Curtis shows a "certain lack of courtesy (but always civil)." Curtis Deposition, Exhibit 6. In 1986, his performance review noted the following "areas for improvement":

> Attitude
> Drive
> Initiative
> Job performance (Special assignments)
> Personnel management
>
> I have worked with Mike on a one on one basis trying to change his attitude, and job performance since 6/27/80 with only minor gains.

Curtis Deposition, Exhibit 5.

Complainant's performance review in December, 1987, was prepared by Michael Keene, Curtis' supervisor. That review stated:

> Mr. Curtis is thoroughly familiar and knowledgeable with all aspects of his job. He performs his duties in an efficient and timely manner and requires no supervision. Mr. Curtis does not, however, deal with people as smoothly as might be desired. His somewhat gruff and abrupt method of handling people, while civil, can be disconcerting to those who do not know him.

Curtis Deposition, Exhibit 7.

No performance review was prepared for Curtis in 1988. Curtis Deposition, Exhibit 8. His performance review in February, 1989, rated Curtis' performance regarding cooperation as below satisfactory. Id., at 2. The comment appended at that part of the review stated:

> Does whatever is asked to do, usually in a timely fashion, but exhibits poor working attitude - would prefer not to be asked to do anything beyond routine round + communication center duties. Is on good working terms with most fellow security personnel but can be abrupt, surly, and rude to nonsecurity employees.

Curtis Deposition, Exhibit 8.

Complainant's next performance review took place on April 17, 1991. Curtis scored satisfactory or higher in all but one category. In that one category, relationship with others, Curtis scored in the area that stated "usually pleasant; however sometimes difficult to deal with." Curtis Deposition, Exhibit 9. In the comments under areas for improvement, Keene wrote:

> Is sometimes overly curt, marginally civil, when dealing with people - needs to work on his P.R. [public relations] (on the other hand he hasn't gotten any worse in his dealings with people) as usual.

Curtis Deposition, Exhibit 9.

On October 9. 1992, Gary Rutledge, manager of the security department for Medtronic, placed Curtis on probation for "surly, non-cooperative, and abusive" conduct toward coworkers, nonsecurity employees, vendors, and visitors. Curtis Deposition, Exhibit 10. Certain behaviors were specifically identified as being below the standard expected of him as an employee with twenty-two years experience. Id. The probation letter indicated that coworkers were asking to work other shifts to avoid Curtis and one employee left Medtronic to avoid Curtis. No probationary period was set in the letter. The last paragraph of the letter stated:

> Reviewing your personnel file I find during the last twelve years reoccurring incidents of inappropriate behavior. I will not permit your past behavior trend to continue. Further occurrences of negative or disruptive behavior on your part will be addressed with disciplinary action up to and including termination.

Curtis Deposition, Exhibit 10.

Curtis took the admonitions of Keene and Rutledge seriously and did not doubt that the criticisms were sincere. Curtis Deposition, at 57-58. Curtis acknowledged the truthfulness of Keene in the 1989 performance evaluation. Id. at 60. Complainant disagrees with the five items of poor performance identified in the probation letter, but he cannot identify any particular circumstances to dispute the contents of the letter. Curtis Deposition, at 101-102.

In mid-1993, Rutledge was informed that a female coworker had made complaints regarding Curtis' behavior. Rutledge Affidavit, at 2. Rutledge met with the complaining coworker and directed Valerie Hayes of Medtronics human resources department to investigate the complaints. Hayes interviewed the complaining coworker and was told:

a. When the coworker first started on the third shift, Curtis said he did not want a woman on the third shift because he did not want to "walk on eggshells" or watch his language.

b. Curtis verbally abused coworkers and "initiated" new security staff.

c. Curtis called the coworker a “fucking idiot” when she made a mistake.

d. The coworker hated the working environment, was frightened of Curtis, and characterized Curtis’ attitude as “I’m an asshole and I’m proud of it.”

e. Curtis passed around “dirty” cartoons and told dirty jokes.

f. The coworker was watching a classic movie on the television in the command center. Curtis changed the channel to an R-rated movie and commented on how the prior movie did not have enough nudity. On a different occasion, Curtis was watching a movie with nudity, the coworker changed the channel and Curtis immediately changed the channel back to the movie.

g. Curtis made comments about the coworker being “full-chested.”

h. On one occasion, the coworker came in with her hair in a bun. Curtis made a joke to that effect that the other workers needed to keep their hands off her “buns.”

i. Curtis expressed anger for opening a door for a vendor when Curtis had wanted to make the vendor wait.

j. Curtis would sleep on the job.

k. The coworker had received Playboy-type cartoons in her mail slot.

l. When a call from a doctor on a Medtronic device came in the middle of the night, Curtis refused to assist in directing the call to the appropriate technical section.

Hayes Affidavit, at 2-4.

Hayes interviewed Curtis’ supervisor, Michael Keene, on September 24, 1993. Keene acknowledged that some of his (Keene’s) conduct could be interpreted as harassment. Keene related that he had seen Curtis “dozing” in the command center. Hayes Affidavit, at 4.

Hayes interviewed Curtis on September 24, 1993. Curtis acknowledged watching R-rated movies containing nudity and sexual content on the television monitors in the command center. Hayes Affidavit, at 4; Curtis Deposition, at 137, 141-144. Curtis acknowledged making comments about female anatomy when such movies were on the television. Hayes Affidavit, at 4; Curtis Deposition, at 143-144. Curtis acknowledged changing the channel to an R-rated movie and commented on how the prior movie did not have enough nudity. Hayes Affidavit, at 4-5; Curtis Deposition, at 164.

Curtis admitted photocopying cartoons and distributing copies to other employees. Curtis admitted making the joke to that effect that the other workers needed to keep their hands off of the female coworker's "buns." Hayes Affidavit, at 5; Curtis Deposition, at 165. Curtis "may" have informed the coworker not to open the door for the vendor. Hayes Affidavit, at 5.

Hayes interviewed three other coworkers and was informed that:

a. Curtis had a negative attitude on the job.

b. Curtis passed around dirty jokes and comics.

c. Curtis is difficult to get along with and has a "hard time" accepting new employees. He uses foul language and has arguments with other security staff.

d. Curtis watched movies with nudity in the command center.

e. The complaining female coworker was seen visibly upset after talking to Curtis. The employee relating this information was not privy to the content of the conversation.

f. The coworkers had heard stories about Curtis refusing to help with the doctor's call and about Curtis sleeping on the job.

Hayes Affidavit, at 5.

After completing the investigation Hayes and Rutledge conferred as to what action was appropriate. They discussed Curtis' employment history and the nature, number, and seriousness of the complaints they had received. They concluded termination was appropriate. Hays Affidavit, at 6. Hayes and Rutledge informed Curtis of the decision to terminate his employment on September 28, 1993. A letter was prepared, at Curtis' request, identifying the reasons for his discharge as sexual harassment and violation of the terms of his probation. Hayes Affidavit, Exhibit C. After his discharge, Curtis' work was performed by existing employees for approximately six months. Rutledge Affidavit, at 3. After those six months, two part-time employees were hired to perform Curtis' duties. Both the new employees were over sixty years of age. Id.

In his deposition, Curtis expressed his belief that Rutledge and Medtronic decided to discharge him based on his age. Id. at 169-173. No comments were made in Complainant's presence regarding the age of employees. Id. at 173. No documents at Medtronic made reference to any employee's age as a factor in retaining that employee. Curtis cannot identify anything other than his subjective belief on which to arrive at a conclusion that his termination from Medtronics was based on age.

The Human Rights Act specifies that, except under limited circumstances, it is an unfair employment practice for an employer to discharge an employee because of age

or otherwise discriminate against an employee because of age with respect to "hiring, tenure, compensation, terms, upgrading, conditions, facilities, or privileges of employment." Minn. Stat. § 363.03, subd. 1(2) (1992).

Minnesota courts have often relied upon federal case law developed in discrimination cases arising under Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act (ADEA) in interpreting the Human Rights Act. Relevant Minnesota case law establishes that plaintiffs in employment discrimination claims arising under the Human Rights Act may prove their case either by presenting direct evidence of discriminatory intent or by presenting circumstantial evidence in accordance with the analysis first set out by the United States Supreme Court in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). Feges v. Perkins Restaurants, Inc., 483 N.W.2d 701, 710 and n. 4 (Minn. 1992); Sigurdson v. Isanti County, 386 N.W.2d 715, 719 (Minn. 1986); Danz v. Jones, 263 N.W.2d 395, 399 (Minn. 1978).

The approach set forth in McDonnell Douglas consists of a three-part analysis which first requires the complainant to establish a prima facie case of disparate treatment based upon a statutorily-prohibited discriminatory factor. Once a prima facie case is established, a presumption arises that the respondent unlawfully discriminated against the complainant. The burden of producing evidence then shifts to the respondent, who is required to articulate a legitimate, nondiscriminatory reason for its treatment of the complainant. If the respondent establishes a legitimate, nondiscriminatory reason, the burden of production shifts back to the complainant to demonstrate that the respondent's claimed reasons were pretextual. McDonnell Douglas, 411 U.S. at 802-03; see also Texas Department of Community Affairs v. Burdine, 450 U.S. 248 (1981); Furnco Construction Corp. v. Waters, 438 U.S. 567 (1978); Anderson v. Hunter, Keith, Marshall & Co., 417 N.W.2d 619, 623 (Minn. 1989); Hubbard v. United Press International Inc., 330 N.W.2d 428 (Minn. 1983).

Indirect proof of discrimination is permissible to show pretext, since '"an employer's submission of a discredited explanation for firing a member of a protected class is itself evidence which may persuade the finder of fact that such unlawful discrimination actually occurred." Haglof v. Northwest Rehabilitation Inc., 910 F.2d 492, 494 (8th Cir. 1990), quoting MacDissi v. Valmont Industries Inc., 856 F.2d 1054, 1059 (8th Cir. 1988). The burden of proof remains at all times with the complainant. Fisher Nut Co. v. Lewis ex rel. Garcia, 320 N.W.2d 731 (Minn. 1982); Lamb v. Village of Bagley, 310 N.W.2d 508, 510 (Minn. 1981).

Minnesota courts have adopted and applied the three-part McDonnell Douglas analysis in deciding summary judgment motions involving claims alleging disparate treatment in violation of the Human Rights Act. Albertson v. FMC Corp., 437 N.W.2d 113, 115 (Minn. App. 1989), citing Sigurdson v. Isanti County, 386 N.W.2d 715, 719-22 (Minn. 1986); see also, Rademacher v. FMC Corp., 431 N.W.2d 879, 882 (Minn. App. 1988); Shea v. Hanna Mining Co., 397 N.W.2d 362, 368 (Minn. App. 1986). The U.S. Court of Appeals for the Eighth Circuit has cautioned that "[s]ummary judgments should be sparingly used [in cases alleging employment discrimination] and then only in those

rare instances where there is no dispute of fact and where there exists only one conclusion ... All the evidence must point one way and be susceptible of no reasonable inference sustaining the position of the non-moving party." Johnson v. Minnesota Historical Society, 931 F.2d 1239, 1244 (8th Cir. 1991) (relying upon Hillebrand v. M-Tron Industries Inc., 827 F.2d 363, 364 (8th Cir. 1987), cert. den, 488 U.S. 1004 (1989); and Holley v. Sanyo Manufacturing, Inc., 771 F.2d 1161, 1164 (8th Cir. 1985).

The elements of a prima facie case of discrimination vary depending upon the type of discrimination alleged, and must be tailored to fit the particular circumstances. Ward v. Employee Development Corp., 516 N.W.2d 198, 201 (Minn. App. 1994). The Complainant's claims in the present case fall into the primary category of adverse action taken against an older employee on the basis of age. In order to demonstrate a prima facie case of age discrimination in suspension or termination, the Complainant must show he is member of a protected class, he is qualified for the position, an adverse action was taken against him, and that younger employees took over his duties. Ward, 516 N.W.2d, at 201.

Medtronic argues that Complainant cannot show he was qualified for the position he held, since his employment record contains consistent complaints about Curtis' job performance. Complainant argues that holding the position for twenty-three years is evidence of qualification for the position. The Complainant also asserts that allowing Medtronic to rely upon the discharge to defeat an element of the prima facie case is circular when the issue is whether the discharge is impermissible. Medtronic also asserts that Complainant cannot show that he was replaced by younger employees.

Based upon the application of the standards set forth above and construing the evidence in a light most favorable to the nonmoving party, the Administrative Law Judge concludes that Curtis has presented sufficient evidence to support a prima facie case of age discrimination. At age 56, Curtis was undisputedly a member of the protected class. The criticisms of Curtis' work performance date back before Curtis' promotion to supervisor. At a minimum, there is a genuine issue of fact whether Curtis was qualified for his position and on a motion for summary disposition that is all that is required. Probation and discharge are adverse actions to Curtis' employment. While there is a dispute over who took over Curtis' tasks at Medtronic, at least some of the duties were performed by younger employees. The facts alleged by the Complainant, if proven at the hearing in this matter, are sufficient to demonstrate a prima facie case of age discrimination.

Respondent has advanced a legitimate, nondiscriminatory reason for both the suspension and discharge of Complainant. The long-term job performance by Curtis was marginal in several areas, most notably in relating to his coworkers. In the critical period immediately prior to his probation and leading up to his discharge, a number of complaints were brought to Complainant's supervisors regarding offensive behavior by Complainant. These complaints were substantial and consistent with each other. The complaints arose from conduct that Curtis had shown throughout his employment with Medtronic.

Complainant asserts that the incidents forming the basis of his coworkers' complaints did not occur and that the conduct that did occur does not rise to the level of sexual harassment. This argument misperceives the nature of the employer's burden. As stated in Elrod v. Sears, Roebuck and Company, 939 F.2d 1466, 1470 (11th Cir. 1991):

> We must make an important distinction before proceeding any further. Much of Elrod's proof at trial centered around whether Elrod was in fact guilty of the sexual harassment allegations leveled at him by his former co-workers. We can assume for the purposes of this opinion that the complaining employees were lying through their teeth. The inquiry of the ADEA is limited to whether ... [the employer] *believed* that Elrod was guilty of harassment, and if so, whether this belief was the reason behind Elrod's discharge. [footnote and citations omitted] [emphasis in original].

In this matter, Medtronic investigated the complaints against Curtis. Curtis himself was interviewed. Curtis acknowledged a number of the incidents complained of by his coworkers. There is no evidence that Medtronic acted on any other basis than the complaints it received. Whether Curtis' actions rise to the level of sexual harassment is not relevant under Elrod. Further, the terms of Curtis' probation rendered him subject to termination for failure to improve his relations with coworkers. The complaints received after the probation began justify the discharge.

Curtis points to the open-ended period of the probation as unusual, but no evidence has been introduced that only older employees receive open-ended probations. The effect of the probation was to give Curtis "final warning" that his behavior needed changing or he would be discharged. The lack of an end date to the probation period does not support an inference of pretext.

Respondent has presented undisputed facts that support the conclusion that there were legitimate, nondiscriminatory reasons for both the probation and discharge. Complainant has not made any showing that there are genuine issues of material fact as to whether these reasons are a pretext for discrimination. The Administrative Law Judge has concluded that no genuine issues of material fact remain for resolution at the hearing and that summary disposition is appropriate in this matter. Respondent is entitled to disposition of this matter in its favor as a matter of law. Thus, the Respondent's Motion for Summary Judgment has been GRANTED.

A.E.G.